IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 415 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE H.H.MEHTA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GOTUBHAI PALUBHAI BHIL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 415 of 1998
MR BS SUPEHIA learned advocate appointed in legal aid for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
Mr.P.R.Abichandani, learned A.P.P. for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.H.MEHTA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 08/10/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE H.H.MEHTA)

1. The appellant who was accused in Sessions Case no. 57/97 has, by filing this criminal appeal under Sec. 374(2) of the Criminal Procedure Code, 1973 (for short Cr.P.C.), challenged the correctness, legality and validity of judgment exh.42 rendered by learned Addl.Sessions Judge, Valsad at Navsari (to be referred to as the learned Judge of the trial court) on 30.4.1998 in Sessions Case no. 57/97 by which the appellant has been convicted under Sec. 235(2) of the Cr.P.C. for offences punishable under Sec. 302 and Sec. 201 of Indian Penal Code, 1898 (for short I.P.C.) and he was sentenced to undergo life imprisonment and to pay fine of Rs.200/- i/d S.I. for 15 days for offence punishable under Sec. 302 of I.P.C. and to undergo rigorous imprisonment for five years and to pay fine of Rs.100/- i/d to undergo further simple imprisonment for seven days for the offence punishable under Sec. 201 of I.P.C.

2. The facts leading to this appeal in a nutshell can be summarized as under :

As per complaint exh. 23 lodged by Manglaben w/o Yuvraj Tumbadubhai Salve (deceased), she and her family members and her husband were staying at village Singana Taluka Ahwa, District Dang. Originally she belongs to village Kukarmunda, Taluka Nizar, District Surat. Her husband Yuvrajbhai (victim-deceased) was serving as teacher in primary school at village Singana. Her husband and she have got three sons and three daughters and amongst that children eldest is Vijaybhai P.W.8, second is Pramodbhai, 3rd is daughter Jyotiben, 4th is daughter Dakshaben, 5th is daughter Surekhaben and 6th is youngest son Siddharth. Out of those six children complainant got married Daksha with one Vasantbhai at village Kasara Taluka Sakri. Rest of the children are unmarried.

3. According to the complainant, about one year before 22.11.1995, the present accused Gotubhai Palubhai Bhil of village Singana had borrowed Rs.12/- from husband of the complainant. The husband of complainant was making demands to pay that amount of Rs.12/- from the accused but accused refused to pay. Thereafter, accused had quarrelled with the deceased and since then accused was keeping some enemical relations with her husband. As per complaint, accused returned that money but at that

time there was verbal altercation with her husband and since then deceased had no relation whatsoever with the accused.

4. On or about 21.11.1995, the deceased had gone to school at about 10.00 a.m. The deceased returned from school to his house at about 5.00 p.m. After taking dinner at about 8.00 p.m. deceased informed the complainant that he was going to Ashram. Thereafter, complainant and her family members went to bed and at about 12.00 p.m. midnight wife of accused came to the house of the complainant and asked her to go with her as her husband was beating teacher (deceased). On receiving this information, the complainant in company of her daughter Daksha and Jyoti and one neighbour Ninuben went running to the house of accused with an intention to rescue the deceased. On reaching at the house of accused, complainant saw that no one was present in the house and she saw that one artificial leg of her husband, pair of spectacles, shawl and bushshirt were lying in Angana (courtyard) of the house of the accused. The complainant did not find the presence of her husband at that place and therefore she went to Police Patel Ratilal and informed him of the incident. Thereupon, police Patel Ratilal informed Dy.Sarpanch Shri Mahrubhai of the incident. According to the complainant, Shri Mahrubhai informed the complainant that they would take proper steps in the morning and therefore the complainant returned to her house. After reaching to her house, the complainant inquired for her husband in the area in the vicinity of her house but her husband could not be traced out. Thereafter, she went to her bed.

5. On next day i.e. 22.11.1995 in the morning the complainant in company of her children, Police Patel Ratilal, Dy.Sarpanch Mahrubhai and other village persons was trying to search out her husband. According to the complainant, dead body of her husband was found at a place at a little distance from the house of accused. That dead body was covered with grass and beside that dead body, one stick which was being kept by the deceased for his support was found lying. According to the complainant, 10 years before the incident her husband met with a railway accident and in that accident, his one leg was amputated and therefore one artificial leg was prepared for her husband.

6. It is stated in her complaint that accused was having enmity with her husband on the ground of borrowing and repaying the money and because of that enmity accused committed the murder of the deceased.

7. Stating the aforesaid facts in her complaint, the complainant w/o of the deceased lodged her complaint stating interalia the name of accused as offender in Ahwa police station at about 9.15hrs. on 22.11.95. That complaint came to be registered as C.R.No.I-49/95. Initially that complaint was registered for offence punishable under Sec. 302 of I.P.C. P.S.O.Patel Ratilal Upadhyay entrusted the investigation of the case to P.W.12 P.S.I.Govindbhai Devsibhai Thakore. First P.S.I.Thakore went to the place of offence and held inquest of the dead body. While holding inquest, it was found that dead body was headless trunk of human male person. That dead body was identified by the complainant. Thereafter, P.S.I.Thakore drew panchanama of scene of offence. He recorded the statements of witnesses who were conversant with the facts of the case. As per evidence of P.S.I.Thakore, he interrogated the accused and during interrogation, accused informed P.S.I.Thakore that he had thrown the head portion of the deceased in kachcha latrine of one Zalamsinh. That head portion was also attached and seized under panchanama. It is the case of the prosecution that headless trunk and head portion of the dead body were attached and seized under discovery panchanamas under Sec. 27 of the Indian Evidence Act at the instance of the accused. That head portion of the dead body was also identified by the complainant. Thereafter, Medical officer was called at the place of incident to perform the post-mortem of dead body. On that very day, he received the post-mortem notes and certificate stating probable cause of death from the medical officer. As per police papers, the accused was arrested at 18.00 hrs. on 22.11.95 and on the next day, at about 13.50 hrs. he was produced before the learned J.M.F.C.Ahwa on 23.11.95. P.S.I.Thakore made a separate report to learned J.M.F.C.Ahwa to make an addition of Sec. 201 of I.P.C. along with Sec. 302 of I.P.C. in the case. When accused was arrested, arrest panchanama was drawn. It is the case of the prosecution that incriminating articles viz. blood stained big stone, blood stained sickle without handle, one woolen cap, one old towel, one shawl, one white shirt, one yellow coloured towel, one artificial leg (from knee to foot), one leather shoe, one pair of spectacles, one bamboo stick, four blood stained stones of different sizes were attached and seized under panchanama from the place of scene of offence. From the place of latrine, one blood stained knife was also attached and seized under panchanama. Investigating officer P.S.I.Thakore found that there was pool of blood in the circumference of one ft. at the place of incident and from that place

blood stained earth and from nearby place sample of normal control earth were taken. All the incriminating articles were sent to Forensic Science Laboratory at Surat (for short FSL) for examination and analysis under a forwarding letter exh. 31. P.S.I.Thakore had received the clothes put on by the deceased and one blood sample from medical officer. Those articles were also seized under a separate panchanama. Thereafter on 23.11.95, accused had shown willingness to produce one piece of cloth of white dhoti and it was attached and seized under panchanama. Thereafter, P.S.I.Thakore received report from F.S.L. and on completion of investigation P.S.I. filed chargesheet against accused in the court of learned J.M.F.C. Ahwa. On 16.2.96 that chargesheet came to be registered as Criminal Case no. 43/96. As one of the offences viz. offence punishable under Section 302 of I.P.C. is exclusively triable by the court to Sessions, learned J.M.F.C. Ahwa by passing order on 26.4.1996 under Sec. 209 of Cr.P.C. committed the case to Court of Sessions Valsad at Navsari.

8. On receipt of papers of that case, said case came to be registered as Sessions Case no. 57/97. The learned Sessions Judge Valsad at Navsari assigned that case for trial to the learned Judge of the trial court.

9. On the basis of material on record, the learned Judge of the trial court framed charge exh. 3 against the accused on 20.01.1998. That charge was read over and explained to the accused. On recording his plea, he pleaded not guilty to the charge and claimed to be tried.

10. In order to prove the case against the accused, charge exh. 3 was framed. The prosecution examined (1) P.W.1 Jagubhai Bablabhai exh. 10, (2) P.W. 2 Lachhiyabhai Umriyabhai exh. 13, (3) P.W.3 Vasantbhai Janiyabhai exh. 14, (4) P.W. 4 Shankarbhai Saynubhai Pawar exh. 16, (5) P.W.5 Shantubhai Bablubhai exh. 17, (6) P.W.6 Jivabhai Punjubhai exh. 20, (7) P.W. 7 Manglaben Yuvrajbhai Salve (complainant) exh. 22, (8) P.W.8 Vijaykumar Yuvraj (eldest son of complainant and deceased) exh. 24, (9) P.W. 9 Ratilal Atiyabhai exh. 25, (10) P.W.10 Mahrubhai Godliyabhai Gamit exh. 26, (11) P.W. 11 Jaydeepbhai Kishorbhai exh. 28, (12) P.W. 12 P.S.I.Govindbhai Devsibhai Thakore (I.O.) exh. 31, (13) P.W. 13 P.S.O.Ratilalbhai Chunilalbhai exh. 34 and (14) P.W.14 Sitaben Gotubhai Bhil (wife of the accused) exh. 35.

11. The prosecution also produced and proved certain documents such as inquest panchanama of headless trunk

exh. 9, discovery panchanama under Sec. 27 of the Indian Evidence Act under which head portion of dead body was attached and seized at the instance of accused exh. 11, inquest panchanama of head portion exh. 12, panchanama of scene of offence at exh. 15, panchanama of clothes from dead body which were sent by medical officer at exh. 18, Recovery panchanama of blood stained piece of cloth which was produced by accused from his hut at exh. 19, arrest panchanama of accused exh. 21, complaint exh. 23, post-mortem notes of headless trunk as well as head portion exh. 29, certificates stating the cause of death exh. 30, office copy of forwarding letter under which the investigating officer sent the incriminating articles to F.S.L. exh. 32, copy of letter of investigating officer addressed to the Director of F.S.L. by which a specific opinion was sought for on the point of blood group exh. 33,map exh. 37 and report of F.S.L. exh. 39.

12. After recording of evidence of prosecution witnesses was over, the circumstance operating against the accused were explained to the accused and whatever the replies were given by the accused were recorded below his plea exh. 4 as a result of which further statement under Sec. 313 of Cr.P.C. was recorded. Looking to further statement, the defence of accused is of a general denial. He has admitted that he is husband of witness P.W.14 Sitaben. It is his say that a false case has been lodged against him. The accused has neither examined himself nor any witness in his defence. He has also not produced any documentary evidence in support of his defence. After hearing the arguments of the learned advocates for both the parties and after examining and appreciating evidence on record, the learned Judge of the trial court came to a conclusion that deceased Yuvrajbhai Tumbadubhai died a homicidal death and that accused by inflicting blows of sickle as well as stick caused such grievous injuries to deceased that such injuries were sufficient in ordinary course of nature to cause death and thereby he committed murder of the deceased. He also came to a conclusion that accused knowingly caused evidence of head portion of the deceased disappear with an intention of screening himself from the legal punishment. On the basis of such conclusions, the learned Judge of the trial court by rendering judgment at exh. 42, convicted the accused under Sec. 235(2) of the Cr.P.C. and gave a finding that accused committed offences punishable under Sec. 302 of I.P.C. and Sec. 201 of I.P.C. Thereafter, learned Judge of the trial court heard the accused on the point of quantum of sentences and after hearing both the parties, he

inflicted sentence for aforesaid two offences punishable under Sec. 302 and 201 of I.P.C.of which reference is made in para 1 hereinabove.

13. Being aggrieved against and dissatisfied with the judgment and order of conviction and sentence, accused has preferred this present appeal.

14. We have heard Shri B.S.Supheia learned advocate who is appointed in legal aid by this court for the appellant and Shri P.R.Abichandani learned A.P.P. for the respondent-State in detail at length. Shri Abichandani and Shri Supheia have taken us through the entire evidence on record.

15. Shri Supheia learned advocate for the appellant has argued that this is a case in which there is neither any direct evidence or oral evidence of any eye witness to the incident to connect the accused with the crime. He has further argued that this case against accused solely rests on circumstantial evidence. He has contended that the learned Judge of the trial court has not correctly appreciated the evidence on record in its proper perspective. He has argued that looking to the facts and circumstances of the case the evidence led by the prosecution does not appear to be probable and possible. He has further argued that whatever the discovery panchanamas are relied on by prosecution are not panchanamas under Sec. 27 of the Indian Evidence Act because the panchanamas were not recorded after arrest of the accused. He has further argued that if these alleged discovery panchanamas are taken out from the record then there is no circumstance operating against the accused connecting the guilt of the accused. He has further argued that learned Judge of the trial court has indirectly placed reliance on police statement of Sitaben w/o the accused through the evidence of I.O. which is not permissible under Sec. 161-162 of Cr.P.C. Lastly, he has argued that there is no complete chain of circumstances to connect the accused with the crime and there are so many infirmities in the case that a reasonable doubt appears on record and therefore accused deserves a benefit of doubt. He has submitted that accused be acquitted by allowing this appeal.

16. Shri Abichandani learned A.P.P. for the respondent-State has supported the impugned judgment throughout. He has argued that learned Judge of the trial court has correctly appreciated the evidence and circumstances listed by him in his judgment are sufficient to connect the accused with the crime. He has

further argued that whatever the submissions are made by Shri Supheia are devoid of merits and same should be rejected. Lastly, he submitted that this appeal be dismissed.

17. We have dispassionately considered the submissions made by learned advocates for both the parties. We have carefully examined and reappreciated evidence on record to come to our conclusion to decide this appeal. We have also examined the impugned judgment and record and proceedings of the case which are called for from the trial court.

18. At the outset of hearing, Shri Supheia has fairly conceded that from his side there is no dispute with regard to nature of death met by deceased. He has further submitted that there is no dispute that deceased died a homicidal death. From inquest panchanama exh. 9, it appears that headless trunk was found from the field which was near the house of accused. From inquest panchanama we found that deceased was cruelly murdered because his head portion was completely severed and at the time of drawing inquest panchanama head portion was not found. From evidence, it further appears that during the course of investigation, accused had shown his willingness to trace out head portion which he had concealed, as a result of which head portion was found from the pit of kachcha latrine situated in the field of Zalamsinh. Second inquest panchanama for head portion of the deceased is produced at exh. 12. As per evidence of P.W. 11 Dr.Jaideepbhai Kishorbhai on 22.11.95 he was performing his duty as medical officer in civil hospital at Ahwa. On that day police had called him at the place of incident for performing post-mortem of the dead body. As per his evidence he reached at the place of incident at 4.00 p.m. and he started to perform the post-mortem and completed it at 6.00 p.m. Whatever external and internal injuries which doctor noticed were recorded by him in post-mortem notes. P.W. 11 Dr.Jaideepbhai has proved the contents of post-mortem notes at exh.29. He has specifically deposed that all the injuries which he noticed were antemortem. He has further opined that injuries were found on the vital parts of the body and the person died spontaneously. He has further deposed that head portion must have been severed before the person died. He has further deposed that all the injuries were possible by muddammal article no. 2 sickle which was shown to him. He has further deposed that he had collected the blood sample from the dead body. This doctor is cross-examined by the defence advocate. Looking to cross-examination, there is no much dispute

with regard to injuries and opinion expressed by doctor. The doctor has given his opinion with regard to probable cause of death as follows : "To my opinion deceased died due to cardio respiratory arrest due to decapitation". In para 17 he has explained as to what is the meaning of decapitation. He has stated that decapitation is separation of head from the body at level of just below thyroid cartilage. Looking to aforesaid evidence of inquest panchanamas and medical evidence supported with post-mortem notes, we are of the view that learned Judge of the trial court has rightly come to a conclusion that deceased died a homicidal death and therefore we uphold this finding of the learned Judge of the trial court.

19. Now this takes us to evidence to decide as to whether prosecution has proved that accused inflicted injuries on the body of the deceased which were noticed by doctor and as a result of these injuries, the deceased died and thereby accused has committed murder of the deceased. As said earlier in this case, there is no direct evidence or oral evidence of eye witness to the incident. Whole case rests on the circumstantial evidence. In case of Sharad Birdhichand Sarda V/s State of Maharashtra reported in AIR 1984 S.C.1622, the Hon'ble Supreme Court has held that " following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established :

1. the circumstances from which the conclusion of guilt is to be drawn should be fully established. the circumstances concerned `must or should' and not `may be' established.
2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say,they should not be explainable on any other hypothesis except that the accused is guilty.
3. the circumstances should be of a conclusive nature and tendency.
4. they should exclude every possible hypothesis except the one to be proved, and
5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. Case law discussed.

A case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction."

20. Prosecution has examined p.w. 1 Jagubhai Bablabhai exh. 10 and P.W. 2 Lachhiyabhai Umriyabhai exh. 13 to prove the discovery panchanama exh. 11 under which head portion of the deceased was attached and seized under panchanama at the instance of accused and inquest panchanama exh. 12 with regard to headless trunk of the deceased. These two panch witnesses turned hostile. They did not support the case of prosecution. So far as inquest panchanama exh. 12 is concerned, there is no dispute from appellant's side but for alleged discovery panchanama exh. 11 there is serious dispute from side of the appellant.

21. To prove the panchanama of scene of offence, the prosecution has examined panch witness P.W. 3 Vasantbhai Janiyabhai exh. 14 and another panch P.W. 4 Shankarbhai Saynubhai Pawar exh. 16. Both these witnesses turned hostile. They have not supported the case of prosecution with regard to contents of panchanama of scene of offence exh. 15.

22. To prove the panchanama exh. 18 with regard to clothes put on by the deceased and which were sent by medical officer after post-mortem, prosecution has examined panch witness P.W.5 Shantubhai Bablubhai exh. 17 and another panch P.W. 6 Jivabhai Punjabhai exh. 20. Both these panch witnesses turned hostile. These two panch witnesses were also examined to prove panchanama exh. 19 for seizure of a piece of cloth from the house of accused produced by accused. As said earlier, these two panch witnesses turned hostile and therefore contents of this panchanama exh. 18 and 19 are not proved by them.

23. The prosecution produced one panchanama exh. 21 for arrest of accused. No panch witness is examined to prove this document. By drawing this panchanama exh. 21, no article was seized from him or his body. From this panchanama exh. 21 it is proved that accused was arrested during the period between 17.45 and 18.00 hrs. on 22.11.95. It is the case of the prosecution that complainant Manglaben visited the place nearby the house of the accused but she could not find the presence of her husband at that place. After seeing dead body and head portion she went to Police Patel Ratilal and informed him about the incident. Prosecution has examined that police Patel Ratilal P.W.9 exh. 25. This witness also turned hostile. He has not supported the case of prosecution and therefore evidence of this witness is of no use because he has not admitted any fact supporting the case

of prosecution.

24. As per the case of the prosecution, Police Patel Ratilal informed Dy.Sarpanch Mahrubhai and appraised of the facts of the incident. Prosecution has examined that Dy.Sarpanch P.W.10 exh. 26. This witness also turned hostile. He has not supported the case of prosecution. Learned A.P.P. who was incharge of the case was permitted to cross-examine this witness and he cross-examined this witness but no material corroborating the case of the prosecution came out from the cross-examination of the witness Mahrubhai.

25. As per the case of the prosecution, complainant went to Ahwa police station and lodged her complaint. Prosecution has examined P.W. 13 P.S.O.Ratilal Chunilal exh. 34 who received complaint and registered the offence. As per evidence of Ratilal, complainant came to him at 9.15 am. on 22.11.95. As stated earlier the incident took place during the period between 8.00 p.m. and 12.00 p.m. on 21.11.95. Prosecution has not explained the delay as to why the complainant lodged her complaint in the morning at 9.15 a.m. on 22.11.95. P.W. 13 Ratilal has deposed that Ahwa police station is at a distance of 36 kms. from the place of offence. As per case of prosecution if complainant informed police Patel and Dy.Sarpanch, then these two leading persons of the village could have instructed her to go to Ahwa police station to lodge the complaint. As discussed earlier police Patel and Dy.Sarpanch both turned hostile and they have not supported the case of the prosecution. Under the circumstances, delay stands unexplained and it creates doubt that complainant lodged the complaint after consultation with village persons, police Patel and Dy.Sarpanch.

26. Complainant Manglaben is examined at exh. 22. She has deposed that deceased Yuvrajbhai was her husband and he new accused Gotubhai. She further deposed that on 22.11.95 her husband came at home from school at 8.00 p.m. and again at 8.00 p.m. he left the house to go to Ashram. She has further deposed that at about 12.00 p.m. midnight Sitaben w/o accused came to her house and she (Sitaben) informed her son Vijay that her husband was beating his father and therefore he should go with her to rescue him. She has further deposed that on hearing this news, she in company of her daughters Daksha, Jyoti and her neighbour Ninubhai went towards the house of accused. She found that clothes of her husband,stick, artificial leg and other articles were lying. She has further deposed that at that time some articles were being burnt

in the house of accused and some articles were also being burnt outside the house. She has further deposed that her husband was using artificial leg because in the year 1984 one leg of her husband was amputated when he met with railway accident. She has further deposed that from the house of accused they came back to their house and informed Vijay that clothes of his father were there but his father was not available. Thereafter they went to house of Police Patel Ratilal and Dy.Sarpanch Mahrubhai. She has further deposed that in the morning at about 6.00 a.m. she went to house of accused and made attempts to trace out the dead body. It is stated by her that in the courtyard of the house of accused, dead body was found lying covered with grass and at that time, it was a headless trunk of dead body. She has further deposed that in company of police Patel she came to police station and lodged her complaint exh. 23. She has further deposed that thereafter police came to their village and later on accused traced out head portion of the dead body from the latrine of Zalamsinh. She has deposed that house of Zalamsinh is at a distance of 70 to 80 ft. from the house of accused. Interestingly prosecution has not examined Zalamsinh in whose field the said latrine was situated and from pit of that latrine, head portion was traced out. She identified the muddammal articles. It appears from evidence that prosecution had attached and seized two towels. It is not certain as to which towel was sent to FSL. She has deposed in cross-examination that there are 12-13 houses of other persons at a distance of 70 to 80 ft. from the house of accused. No one is examined from these houses. If incident took place at about 12.00 midnight, certainly deceased would have shouted for help and persons residing in the houses at a distance of 70-80 ft. must have heard shouts of the deceased. Not a single occupant of these houses is examined by the prosecution. In cross-examination, she has also deposed that it was true that she did not know as to from where police had brought the head portion of her husband. As per inquest panchanama exh. 12 it is the case of the prosecution that when inquest panchanama was drawn for head portion Manglaben w/o Yuvrajbhai was present and she identified the head portion. In spite of this case, the complainant has deposed that it was true that she did not know as to from where the head portion was brought by police. Thus, recovery of head portion has become doubtful because complainant was not present when inquest panchanama exh. 12 was drawn. From evidence of complainant only one thing appears that wife of accused came to her house at about 12.00 p.m. in the midnight and she informed Vijay that his father was being beaten by her husband. Said

information was given to Vijaybhai. Vijaybhai is examined at exh. 24. The conduct of Vijaybhai is curious. When he received the information that his father was being beaten, he did not go to inquire about his father. He is aged about 27 years. Instead of him, his mother went to inquire for his father. What Vijay received information is an information through Sitaben. Sitaben has not supported the case so advanced by the prosecution and therefore at the best it can be said that what Vijaybhai heard is a hearsay evidence because it is not supported by Sitaben. From evidence of Manglaben and Vijaybhai, no circumstances are established except that Sitaben came to inform Vijay that his father was being beaten and no more. Looking to the case as advanced by the prosecution accused inflicted injuries on person of deceased with the help of stick and sickle. He severed the head portion of the deceased and he went to the field of Zalamsinh and thew the head portion of the deceased in the pit of latrine situated in the field of Zalamsinh. If Manglaben had rushed from her house to house of accused immediately, then she would have certainly seen the accused going with the head portion towards the field of Zalamsinh. From evidence it is not clear as to what is the distance between the house of complainant and house of accused and within what time she reached there. Under the circumstances, evidence is not clear as to whether accused had severed the head of deceased before Sitaben went to house of the complainant to inform Vijay or whether he had severed the head subsequently. From evidence of Manglaben and Vijay we cannot come to the conclusion that no body else but only accused inflicted injuries and severed the head of deceased and he went to field of Zalamsinh and threw the head in the pit of latrine.

27. To connect the accused with the crime prosecution relies on two alleged discovery panchanamas under Sec. 27 of the Indian Evidence Act. First panchanama is exh. 11. According to prosecution case, during the period between 13.45 hrs and 14.05 hrs on 22.11.95, accused had shown his willingness to show the head portion of the deceased which he had concealed. Admittedly accused was arrested between 17.45hrs. and 18.00 hrs. on 22.11.95 and therefore this panchanama exh. 11 appears to have been made before arrest of accused. It can be said that accused was not in custody of the police when he had shown his willingness to trace out the head which he had concealed. For such type of discovery panchanama under Sec. 27 of Indian Evidence Act, Hon'ble Supreme Court has voiced certain caution for appreciating evidence of such panchanama under Sec.27 of Indian Evidence Act. In

case of Sanjay V/s State (NCT of Delhi) AIR 2001 SC 979,it is held that as the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It is further held that the court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Sec. 27.

28. One more ingredient for bringing the case under Sec. 27 of the Indian Evidence Act is that it is required to be established by the prosecution that accused was in police custody when he had shown his willingness to trace out the muddammal article. The recovery of object is not discovery of fact envisaged in Sec. 27. The "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect and therefore such information ought to have been given by the accused when he is in police custody. It is held in case of Bodhraj V/s State of J & K reported in AIR 2002 SC 3164 that under Sec. 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in the custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This material ingredient is required to be established that accused gave information when he was in police custody which is lacking in this case and therefore panchanama exh. 11 cannot be said to be discovery panchanama under Sec. 27 of the Indian Evidence Act. If this panchanama exh. 11 is taken out from the evidence there remains no evidence except of word of Manglaben and Vijaybhai that Sitaben had come to inform them that father of Vijaybhai was being beaten by her husband. It be noted that Sitaben has not supported the case of the prosecution.

29. If we examine the evidence on record on the point of probability factor the case advanced by the prosecution is not believable. When head is severed,

then certainly there would be heavy flow of profuse bleeding from the body of the deceased. As per panchanama exh. 15, dried blood was found in the area of circumference of 1 ft.only at the place of incident. This is a case in which it is stated that accused, after severing the head took that head for a considerable distance upto the field of Zalamsinh. As per panchanama of scene of offence exh. 15, kachcha latrine of Zalamsinh is situated at a distance of 314 ft. towards east from the scene of offence. If one would carry recently severed head for place at a distance of 314 ft. then certainly blood would have been seen by the panch witnesses on the way from scene of offence to latrine of Zalamsinh. Not a single blood dot was seen by panch witnesses. This is not possible in view of the facts stated in the panchanama.

30. It is the case of the prosecution that with the help of muddammal sickle accused severed head of deceased. This sickle was found at the place of scene of offence where dried blood in the area of one ft. was noticed by panch witnesses. This sickle is without handle. We know that pointed portion of the sickle is to be fixed in the wooden handle and one can have a grip to hold such sickle with handle for use. Without handle, one cannot severe a head of a human being by use of this handleless sickle. This is not possible.

31. Learned trial Judge of the trial court has placed reliance on police statement of Sitaben by using evidence of investigation officer who recorded it. This use is made for corroboration of the case of the prosecution. This is indirect use of police statement for the purpose of corroboration which is not legally permissible at all. The police statement can only be used for the purpose of contradiction and for no other purpose. Therefore learned Judge of the trial court has seriously erred in placing reliance on the contents of police statement of Hostile Witness Sitaben through the evidence of I.O.

32. In view of what is stated hereinabove, we do not find any circumstance against the accused. The prosecution has not proved the case using the circumstance by excluding every possible hypothesis involving the accused. In this case, the prosecution has not satisfied the conditions which we have narrated hereinabove and therefore the case is not proved beyond reasonable doubt. Looking to the evidence on record, there is a serious doubt with regard to implication of accused because the dead body was found near the field of Kasia Sukiabhai. He is not examined by the prosecution.

Possibility cannot be ruled out that Kasia Sukiabhai might have caused death of deceased because dead body was found very nearer to his field. Possibility also cannot be ruled out for Zalamsinh who might have caused death of deceased because from pit of his latrine, head portion of the deceased was traced out.

33. If the case rests on circumstantial evidence then prosecution must positively prove the facts with regard to motive. Here in this case, prosecution has come with a case that before one year, accused had borrowed Rs.12/from the deceased and accused was not repaying that amount as a result of which verbal altercations had taken place. From complaint, it appears that complainant has stated that said amount was repaid by the accused. If that amount was repaid, then there was no question of any quarrel with regard to that amount and therefore the case advanced for motive is not possible to swallow. On this count also, the prosecution has totally failed to prove the case by producing evidence with regard to motive.

34. Considering the evidence on record, we are not satisfied with the findings arrived at by the learned Judge of the trial court and therefore the judgment in question which is challenged in this appeal cannot be sustained on this type of shaky and hazy evidence. The judgment requires to be quashed and set aside.

35. For the foregoing reasons, this appeal deserves to be allowed and accordingly it is allowed. The judgment and order of sentence and conviction exh. 42 rendered by the Addl.Sessions Judge, Valsad at Navsari on 30.04.1998 in Sessions Case no. 57/97 is quashed and set aside. The accused is ordered to be made free if he is not required in any other case. Muddammal articles be destroyed.

(H.H.MEHTA, J)

(SHARAD D DAVE, J)

srilatha